Office Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1928.

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No. 106.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF MINNESOTA.

In Error to the Supreme Court of the State of Minnesota.
Filed April 9, 1928.

No. 107.

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

THE STATE OF MINNESOTA.

Appeal from the Supreme Court of the State of Minnesota.
Filed April 9, 1928.

BRIEF OF PLAINTIFF IN ERROR AND APPELLANT.

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Dated November 14, 1928.

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The opinion supporting the judgment under review is reported in 174 Minnesota Reports 3, 218 N. W. 167.

Jurisdiction is asserted here under Section 237 of the Judicial Code, 43 Stat. L. 937, which provides that a final judgment in any suit in the highest court of a state in which a decision in a suit could be had, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error.

The opinion in the court below was rendered on March 2, 1928 (R. 224), and judgment in accordance therewith was filed on March 23, 1928 (R. 231). Petition for writ of error was filed on March 26, 1928 (R. 219), and allowed on the same date (R. 215). Notice of appeal and petition for allowance of appeal were also filed on March 26, 1928 (R. 236), and appeal was allowed on the same date (R. 244).

The basis of jurisdiction of this Court lies in the fact that the Supreme Court of Minnesota is the highest Court of that State and that the validity of a statute of the State of Minnesota was drawn in question in this suit in that Court, upon the ground that such statute was repugnant to the Constitution of the United States. This constitutional question was raised by answer (R. 8-11), and by supplementary petition for reargument. The State Court actually considered the constitutional question, and specifically decided it in favor of the validity of the statute assailed (R. 224-231).

Cases which sustain the jurisdiction of this Court under these circumstances are:

San Jose Land and Water Co. v. San Jose Ranch Co., 189 U. S. 177 at 179.

Montana ex rel. Haire v. Rice, 204 U. S. 291 at 299.

Chambers v. B. & O. R. R. Co., 207 U. S. 142 at 148.

Miedreich v. Lauenstein, 232 U. S. 236 at 243.

Mallinckrodt Chemical Works v. State ex rel. St. Louis, 238 U. S. 41 at 49.
Cissna v. Tennessee, 246 U. S. 289 at 293.

Review is being sought in this Court, both by writ of error (Docket No. 106) and by appeal (Docket No. 107). This is because the Act approved January 31, 1928, c. 14, 45 Stat. 54, after abolishing writs of error and substituting appeals, contains a proviso "that the review of judgments of state courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts". It is not clear to us whether the requirement that review shall be "in the same form" is intended to preserve writs of error for the review of judgments in state courts, or to substitute appeals, using the forms for writs of error, and we accordingly took both forms of procedure. We assume that the court will dismiss one proceeding or the other, whichever may be held to be improper. The Act approved April 26, 1928, c. 440, 45 Stat. 466, makes it clear that an appeal and not a writ of error is the proper remedy under that Act, but these proceedings had been initiated before the latter statute was passed.

A former judgment in this same action was before this Court upon writ of error in Docket No. 124 of the October term 1926, and was dismissed for want of jurisdiction resulting from an insufficient setting forth and waiver of the claim of a substantial Federal Constitutional question in the Court below. 273 U. S. 658. Following the dismissal of said writ of error, the judgment, of which a review had thus been denied, was vacated by the Supreme Court of the State of Minnesota (R. 223), and thereafter that Court entertained a petition for reargument of the Federal Constitutional questions and later still entered the judgment which is here under review, and in which that Court

did in fact decide the Federal Constitutional questions involved, in favor of the validity of the State statute (R. 224). Both the appeal and writ of error which are now before this Court are from the latter judgment.

The action was brought by the State to collect a tax of over half a million dollars levied under the Minnesota Gross Earnings Tax Statute, which levied a tax of 4% (formerly 3%) on intrastate earnings of railways in Minnesota and on Minnesota's mileage proportion of all items of interstate earnings. The defendant had published a single charge for an entire service consisting of hauling iron ore from the mines in Minnesota to the Lake docks in Wisconsin, mixing, grading and storing the ore upon these docks in Wisconsin, and loading it upon steamships. The dock was owned and the dock service was performed by a subsidiary Dock Company, under a contract whereby approximately one-fourth of the total charge was paid by the Railway to the Dock Company for its service, the balance being retained by the Railway Company as compensation for the rail haul. About 81% of the rail haul mileage was in Minnesota and accordingly the Railway Company paid the Minnesota Gross Earnings tax upon 81% of the rail haul compensation retained by it, but did not pay any Minnesota tax upon that part of the total charge which was paid to the Dock Company for its services in Wisconsin. This action was brought to compel the Railway Company to pay the Minnesota tax upon 81% of the money thus paid to the Wisconsin Dock Company.

It was alleged in paragraphs VI and VII of the amended answer, particularly in the last half of paragraph VII (R. 10-11) and shown in the evidence, that the Minnesota mileage proportion of the said property was very much in excess of the value proportion, and that a mileage prorate to Minnesota of the total earnings would subject property out-

side of the State to taxation within the State, and would unreasonably tax proceeds of interstate commerce, and would render the said laws invalid and in contravention of Section 8 of Article 1 of the Constitution of the United States and of Article 14 of the amendments thereof. In spite of this answer, and evidence offered in support thereof, the lower Court entered judgment in favor of the State (R. 211). The Railroad Company appealed to the Supreme Court of the State of Minnesota, which, after vacating an earlier judgment, finally, affirmed the judgment of the lower Court (R. 224). This writ and appeal run to the last judgment of the Supreme Court of the State.

STATEMENT OF THE CASE.

The statutes under attack are the following laws of Minnesota:

Laws of 1873, Chapter 111.

Laws of 1887, Chapter 11 (Revised Statutes of 1894, Section 1669).

Laws of 1889, Chapter 235.

Laws of 1903, Chapter 253.

The greater part of the tax is assessed under the last named statute, which covered the years 1905 to 1912, inclusive, and is similar in terms to the earlier statutes, except that it changed the tax from three per cent to four per cent, so that it seems sufficient to quote only from chapter 253 of the laws of 1903, which read as follows:

> "1. Every railroad company owning or operating any line of railway situated within or partly within this State, shall during the year 1905 and annually thereafter, pay into the treasury of this State, in lieu of all taxes and assessments upon all property within this State owned or operated for railway purposes by such company, including equipment, apparatus, appendages and franchises thereof,

a sum of money equal to 4 per cent of the gross earnings derived from the operation of such line of railway within this State; and the annual payment of such sum shall be in full and in lieu of all other taxes and assessments upon the property and franchises so taxed. * * *"

"2. The term 'the gross earnings derived from the operation of such line of railway within this State', as used in Section 1 of this Act, is hereby declared and shall be construed to mean all earnings on business beginning and ending within the State, and a proportion, based upon the proportion of the mileage within the State to the entire mileage over which such business is done, of earnings on all interstate business passing through, into or out of the State."

Under the Minnesota Statute, each separate item of interstate revenue on each separate shipment is allocated to Minnesota in proportion to the mileage of that particular shipment. While 26% of all Great Northern mileage is in Minnesota, this does not mean that 26% of all Great Northern interstate revenue is allocated to Minnesota. On the contrary the allocation may include 10% of the revenue on one shipment, 50% on another and 90% on a third, depending on what proportion of the mileage of each particular shipment is in Minnesota. It is the sum of these separate allocations that constitutes the total amount on which the tax is computed.

We are not attacking the validity of these statutes as applied to interstate *rail line* earnings of the railroads. This Court has held that similar statutes are constitutional as applied to line haul earnings. What we are contending is that there would be a violation of the Federal Constitution in applying such a statute to the Wisconsin dock revenue involved in this case.

The facts appearing in the record are as follows. During the years 1901 to 1912, inclusive, the plaintiff in error and

appellant owned or controlled through subsidiaries, and operated a line of railroad approximately one hundred seven miles in length, extending from the Mesabi Iron Range, in Minnesota, and reaching docks upon the shore of Lake Superior, at Allouez, Wisconsin (R. 49). The docks and about twenty miles of the railroad were located in Wisconsin (R. 14). The balance, which was 81.55% of the entire track was located in Minnesota (R. 2, 6). The docks, and the tracks immediately connected therewith, were owned and operated by a subsidiary corporation, which will hereinafter be referred to as the Dock Company, the entire stock of which was, until 1906, owned or controlled by the plaintiff in error (R. 14, 15). In 1906, the iron ore properties of the Great Northern Railway Company, together with stock in certain subsidiary companies, including the Dock Company, were transferred to the Trustees of the Great Northern Iron Ore Properties, to be held in trust for the persons who were shareholders of the Great Northern Railway on December 7, 1906 (R. 122-126). From that time on, there was a divergence in the beneficial ownership of the stock of the Great Northern Railway Company, and the stock of the Dock Company, and the control of the Dock Company was independent of that of the Railway Company (R. 123).

When the ore trains reached Lake Superior at Allouez, the cars were turned over to the Dock Company, which performed certain services in switching, classifying and storing the cars, in transferring them to the docks and unloading the ore into storage pockets, and in mixing, grading, sorting and storing the ore and later loading it into steamers (R. 17, 39-42).

The total charge paid by the shipper for the entire service from the mine to and through the dock and into the steamer varied from 80¢ to 60¢ per ton at different times (Exhibits E-I, inclusive, R. 146-150). The Railway Company and the Dock

Company had entered into contracts whereby the Dock Company was to receive a portion of this total charge varying at different times from 25¢ to 15¢ per ton for its portion of the service (R. 66-67). Up to 1906 when the publication of tariffs was first required by statute, there was no published tariff covering this service, the amount of the charge being merely a matter of common knowledge among the shippers (R. 28, 68). After 1906, the charge was covered by printed tariffs issued in the name of the Railway Company, but providing that the published charge should include dock service (Exhibits E-I, R. 27, 146-150). At all times, both before and after the publication of the tariffs, the Railway Company collected the entire charge from the shipper and paid the Dock Company its proportion. It is a common practice for one connecting railway company to collect an entire through charge, later remitting to other connections their proper proportions (R. 67).

In reporting its revenue to the State of Minnesota for taxation, the Railroad Company first deducted from the total charge thus collected, the amount paid to the Dock Company, and reported the balance as rail haul earnings, allocating the mileage prorate of such balance, or 81.55% to Minnesota, and paying a 4 per cent tax thereon during the years 1905 to 1912, inclusive. The tax was 3 per cent in 1901 to 1904, inclusive. This is all admitted in the pleadings (R. 2-3, 6). In 1913 the State tax officials concluded that the entire charge collected from the shippers, including the amounts paid to the Dock Company, as well as the amounts retained by the Railway Company, should have been prorated to the State of Minnesota in proportion to the track mileage, and demanded that the Railroad Company pay the State a tax upon the track mileage proportion of the amounts paid to the Dock Company. The dock revenue thus sought to be taxed, amounted to over $16,000,000, and the tax

claimed amounted to $510,859.22, in addition to penalties and interest (R. 4-5). The Railway Company refused to pay this additional tax and this suit was brought to enforce the same.

While the stock of the Dock Company was owned or controlled by the Great Northern Railway Company until 1906, and while the two companies had certain executive officers in common, the actual operation of the dock was under the charge of a superintendent who was an exclusive employe of the Dock Company, and who had entire charge of the dock, its employes and operation. The Dock Company kept a full set of accounts, made its own reports to all public authorities, carried its own payrolls, purchased its own materials, and handled its own funds (R. 25, 29, 34, 44-45, 47-48, 71, 90). It made its own returns under the Federal Capital Stock Law which includes its earnings from the operation of this dock and paid its own Federal Capital Stock tax thereon (R. 47). It was ready to handle ore tendered to it by other companies and did in fact handle a small amount for another company (R. 78-79, 116). It did not have its name appear on the tariffs for the reason that until a decision of the United States Supreme Court in 1911 or 1912, holding to the contrary, it believed that it was not subject to the provisions of the Interstate Commerce Act (R. 124).

When the total charge was 80 cents, and when the amount paid to the Dock Company was 25 cents, the Railroad Company deducted the 25 cents from the 80 cents, leaving 55 cents as rail haul earnings, and prorated eighty-one and fifty-five hundredths (81.55) per cent of this 55 cents (being the track mileage proportion) to Minnesota, and paid the tax thereon. The reasonableness of the amount apportioned to the Dock Company, or set aside for dock service, is not questioned. There is no evidence in the record, and the State did not attempt to

show, that the charge paid to the Dock Company was out of proportion to the service rendered by it or to the amount of property used by it.

While 81.55 per cent of the track miles were in Minnesota, only about 60 per cent of the investment was in Minnesota. In 1911, for example, the investments were as follows: (R. 60-62, 97, 98, 100)

Total Wisconsin (dock and 20 miles of railway)	$7,029,926
Dock	5,398,476
20 Miles of Railway (in Wisconsin)	$1,631,450
Track in Minnesota	10,739,828
Track Both States (106 miles)	$12,371,278
Track Investment per Mile	$116,710

It will be noted from the above that although 81.55 per cent of the track miles were in Minnesota, only 60.4 per cent of the total investment was in that State, and that the one mile of dock property in Wisconsin was worth forty-six times as much as an average single mile of track in Minnesota.

Similar total investment figures as of each of the years 1908 to 1912, inclusive, are contained in the record (R. 60-62).

There were four (4) docks in all. They were elaborate structures nearly a mile long, and rising 75 feet above the water (R. 38-39). Every dock had six (6) railroad tracks upon it, and had inclined approach tracks up which the cars were run from the ground level. Three (3) of the docks were of timber construction and one of steel and concrete. Every dock contained from 100 to 250 bins or pockets into which ore was dumped from the cars. Upon the docks were some eight (8) different buildings including offices of the Agent and Superintendent, interlocking plant, telegraph office, and heating house for thawing the ore in cold weather (R. 38-39).

Connected with the docks were inbound and outbound yards containing 23 tracks, each from 3,400 to 3,876 feet in length, and two classification yards containing 15 or 16 tracks each, making about 53 yard tracks in all, or 53 times as much track per mile as any mile of single track railroad (R. 115-116). Connected with these yards were the buildings necessary for a railroad terminal, consisting of a roundhouse, storehouse, oil and sandhouse, water tanks, scales, cinder pits, turntables, etc. (R. 116). These yards and terminal facilities were all owned and operated in the name of the Dock Company, and use of them was included in its charge (R. 47).

The amount of service performed by the Dock Company was far more elaborate and costly, in proportion to its single mile of property, than was the service performed on any mile of track in Minnesota, so that the proportion of the total service, which was performed in Minnesota was very much less than the proportion of mileage in Minnesota. Moreover, the service of the Dock Company was largely in the nature of a treating process, entirely distinct from transportation, and not related to track mileage in any way.

The ore coming from the mines was of varying mineral content. It was necessary, in marketing it, to sort out the different grades of ore, and to mix lower grade ore with higher grades, in order to produce a mixture for commercial use. This sorting, grading and mixing process was performed by the Dock Company (R. 49-50). The ore came from about a hundred different mines and had to be graded and sorted into about a hundred different grades (R. 49). The first step in this process consisted in running cars into the classification yard and sorting them according to grade of ore, before running them upon the dock, and involved considerable switching service (R. 50). When the cars reached the dock, different cars had to

be unloaded in the same pockets, or different pockets, in order to get the right mixture, and it was frequently necessary to store ore in partially filled pockets or upon cars for a considerable period of time awaiting the arrival of further ore of a proper grade for purposes of mixture (R. 41-42, 51). Each pocket was provided with a spout which could be raised or lowered by machinery for the purpose of loading the ore from the pocket into the vessel (R. 39).

During cold weather the ore usually had to be thawed out by steam before it could be unloaded from the cars into the pockets or run from the pockets into the steamer. The Dock Company provided the steam plant and thawing apparatus for this purpose. This was an expensive process (R. 51, 81-83). Whether the ore had been frozen or not, it was frequently wet and sticky, and a special force of men was employed with long poles for the purpose of prodding the wet ore out of the cars and causing it to slide into the pockets and later in prodding it out of the pockets into the steamer (R. 41).

When the total charge was 80 cents, and 25 cents was paid to the Dock Company, the remaining 55 cents covered 106 miles of rail haul or approximately .51 cents a mile for the rail haul, so that the charge of 25 cents for the single mile of dock service was nearly fifty times as great as the charge for a single mile of rail haul. The State offered no evidence that this division of the total charge was unreasonable or disproportionate to the service.

This ore line as measured by its gross revenue and by the character of its business was an easily severable and very substantial part of the entire railway system of plaintiff in error, and had been constructed, and operated for some time, by a separate railroad company (R. 17). The revenues of the Dock Company for 1912 as shown by Exhibit A attached to the com-

plaint were $2,087,520.46 (R. 5). As the Dock Company received only about one-fourth of the total revenue paid by the shipper including the line haul and dock service, the total revenue from ore service for that year must have been approximately four times the dock revenue or about $8,350,000. According to the annual report of the Interstate Commerce Commission for 1912, there were then 169 Class I railways in the United States and only 72 of them or 42% earned over eight million dollars. In other words, the ore line and the dock company if separately owned, or considered as separate property, would have been among the larger 42% of the Class I railways of the United States measured by gross revenue.

Moreover, the total revenue from ore service which Minnesota is attempting to allocate to herself is approximately one-fourth of all the revenue of the Great Northern Railway system from all sources which is allocated to Minnesota. We have seen in the last paragraph that the total revenue from ore service in 1912 was approximately $8,350,000. 81.5 per cent of this, which the State claims as Minnesota revenue, amounts to $6,805,250, and a four per cent tax on it would amount to $272,210. The total tax paid by the Great Northern Railway Company to Minnesota on revenue from all sources in 1912 was $1,165,021.29. (Amended answer, paragraph 6, amended reply, paragraph 2, R. 8, 12). This is approximately four times the amount just computed as the Minnesota tax on revenue from ore service only. A very substantial portion of the entire tax paid is assessed against revenue which is wholly intrastate. If this were deducted from the total tax paid, the remainder, which would be the tax assessed against mileage prorates of interstate revenues, would be a much smaller sum and would be much less than four times the tax assessed against ore revenues. It follows that the ore lines and docks,

and the ore traffic, which are covered by the investment figures and other evidence in this case, constitute a very substantial proportion of the entire system, and of all the traffic which the Great Northern Railway system handles across the boundaries of Minnesota.

It has not been customary to apply the mileage prorate provided for by the Minnesota Statute to separate charges made for terminal services. Where shipments of commercial freight are hauled into Minnesota terminals from points outside the State, a separate charge is assessed in Minnesota for some terminal services, such as switching, storage and demurrage (R. 57-58, 65, 125). It has been customary to report 100 per cent of the earnings from such terminal service as Minnesota earnings, and not to apply the mileage prorate. The same rule applies to charges for storage of freight and baggage, and some elevation charges (R. 57-58). The mileage prorate is not applied to such revenue, even though earned in connection with interstate shipments.

During the years in question, ad valorem taxes were paid in Wisconsin upon the property of the Dock Company, as well as upon that portion of the trackage located in Wisconsin (R. 126).

The assigned errors, which will be urged in this brief, are all of the errors assigned on pages 241 to 244 inclusive of the printed transcript, and all go to the point that the Court erred in holding that the statutes in question, as construed by the Supreme Court of Minnesota, are not in conflict with Section 8 of Article 1 of the United States Constitution, and with Section 1 of the 14th Amendment, and in holding that the statutes, as construed by the Court, did not impose an undue and unreasonable burden upon interstate commerce; did not deprive plaintiff in error of property without due process of law, and

did not withhold from plaintiff in error the equal protection of the law; and that the Court erred in denying to plaintiff in error the immunity claimed by it under the aforesaid portions of the Constitution from the tax sought to be imposed in this action.

SUMMARY OF ARGUMENT.

The statute, as construed to apply to the earnings in question here, is unconstitutional because it assesses against the defendant, a Minnesota railway corporation, a tax upon earnings of a Wisconsin dock company separately incorporated.

Even if the Dock Company be regarded as an agency of the defendant Railway Company, the statute, if construed as applying a mileage prorate to the entire earnings from ore service, is unconstitutional; first, because the value of the dock property in Wisconsin, which contributes to the earnings, is approximately fifty times as valuable per mile as the average mile of track in Minnesota; second, because the services performed in and about the dock and yards in Wisconsin are many times more elaborate and costly per mile than the service performed on an average mile of track in Minnesota; third, because the portion of the charge applied by the defendant to the single mile of dock service in Wisconsin was approximately fifty times as great per mile as the charge for an average mile of rail service in Minnesota; and fourth, because a portion of the earnings is fairly attributable to an ore treating and storage process in Wisconsin which was not a part of nor incident to transportation and not related to track mileage, and, therefore, not subject either to mileage prorate nor to any other apportionment to Minnesota.

The *method of assessment* being one that tends to tax earnings and property in Wisconsin, the resulting tax necessarily violates the Federal Constitution.

It is not necessary to consider whether there are any equally valuable terminals in Minnesota on other lines of the defendant handling general traffic, or whether there is any off-setting under-assessment by Minnesota on defendants earnings from general traffic. The state has offered no evidence of such an off-set, and an under-assessment in Minnesota would be no defense against an over-assessment on other property, particularly when located in Wisconsin.

The investment in the Twin City terminals in Minnesota cannot be compared with or offset against the value of the Wisconsin ore docks. The Twin City terminals forward and receive freight to and from hundreds of stations in many different states. They are used by a much larger number of shipments than are any country terminals in other states, and the correspondingly larger number of items of taxable revenue, tends to produce a total tax for Minnesota more than adequate in proportion to investment. Moreover, this terminal investment must be spread over and charged against all of the large number of shipments using the terminal, so that the amount of investment per mile fairly chargeable against each individual shipment in Minnesota, may be smaller than in other states. The costly mountain construction in the West, with relatively lighter traffic density, produces an investment per mile chargeable against each individual shipment in other states, offsetting that in Minnesota.

The Wisconsin docks are used exclusively for ore, and the total investment is chargeable 100% against the ore traffic. This traffic originates entirely on a limited number of mine spurs in Minnesota, and the total investment in these spurs has been

credited to Minnesota in comparing her investment in ore facilities with that of Wisconsin.

The ore line is in effect a separate railroad. Its revenue constitutes 25% of the Great Northern interstate revenue taxable by Minnesota. Its earnings are in part attributable to a treating process which is not an incident of transportation. For these reasons, we are entitled to relief in this case, notwithstanding the fact that our attack upon the mileage prorate is confined to the ore line alone.

ARGUMENT.

The fact that the earnings sought to be taxed here were earnings of a dock company incorporated in Wisconsin and doing business solely in Wisconsin, as well as the fact that they were derived from interstate commerce, would seem to be good and sufficient reason why they should not be taxable against a railway company in Minnesota. This objection was overruled by the State Court upon the ground that the stock of the Dock Company was owned by the Great Northern Railway Company, that part of the executive officers were the same, and that the ore service included both rail haul and dock handling as a unit, each function being necessary to and dependent upon the other,—in short that the Dock Company was a tool or instrumentality by which the Railway Company discharged a part of a single service to the shipper, and that, therefore, the revenues of the Dock Company were really railway revenues.

The undisputed evidence shows that the Dock Company was a separate corporation keeping separate accounts and funds, making separate reports, and having an independent operating organization which directed its functions, and that after 1906,

its ownership was independent of the Railway Company. The facts are undisputed. The conclusion of the State Court that these facts made it permissible for Minnesota to tax the Great Northern Railway Company for earnings of the Dock Company, is a conclusion of law involving a constitutional question. We believe that it is within the province of this Court to re-examine that conclusion, and that a reversal of the judgment is required upon the ground that, when the undisputed facts show an assessment against one person or corporation on the earnings of another outside the state, such assessment necessarily violates the Federal Constitution.

However, for the purpose of further argument, we will temporarily assume the correctness of the conclusion of the State Court on this point. We may even assume for this purpose that there was no separate Dock Company, but that the Great Northern Railway Company owned and operated the dock property in its own name and in conjunction with its rail lines. Even with these assumptions granted, we are still confronted with facts which make the attempted tax unconstitutional in this case.

We recognize that while earnings from interstate commerce are not per se taxable by a state, either as a whole or in any proportion, nevertheless the property that produces them and which is located in a state is taxable in that state; and the earnings of that property both from intrastate and interstate commerce may be treated as a measure of the value of the property and may, therefore, be taxed directly, in lieu of a property tax, *so long as the earnings that are taxed are earnings that are fairly attributable to the property that is located within the state.*

In valuing the property located in the State for the purpose of assessing an ad valorem tax upon it, it is ordinarily proper

to value an entire interstate line, and to prorate such value to the State on a mileage basis, it being presumed, in the absence of evidence to the contrary, that the values per mile are approximately uniform. Similarly, where the tax is against, or is measured by the earnings of that portion of an interstate railway located in a single state, a total interstate charge may be apportioned to the State on a mileage prorate, it being presumed that the earnings of the entire line per mile are approximately equal.

The rules just stated are based upon the fact that there is ordinarily a close relationship between the amount of a railroad charge and the length of the haul. In other words, there is ordinarily a relationship between mileage and earnings. The longer the haul, the greater will be the charge. And the keystone of this doctrine is the presumption that, in the absence of evidence to the contrary, the value of each mile of railroad is approximately equal, and that an approximately equal proportion of every total charge is fairly attributable to each mile of haul. If the service rendered is something other than transportation, so that there is no logical relationship between amount of charge and track miles, or if it affirmatively appears that the physical values per mile are not equal, or that the proportion of earnings fairly attributable to each mile is not equal, there can be no room for the application of this doctrine.

Under the facts appearing in this record the doctrine above stated is not applicable in this case. The first of these facts is that the value per mile of the railroad in question is not uniform, but is much higher outside the State than inside. The record shows a total investment in 1912 of $17,849,774 in the tracks located in both Minnesota and Wisconsin and in the docks in Wisconsin. As 81.55% of the mileage was in Minnesota, a mileage prorate would give Minnesota $14,554,490.69

of this investment, whereas the actual investment in Minnesota was only $10,879,591 (R. 61). To allocate 81.55% of the entire investment to Minnesota would, therefore, give Minnesota an excess of nearly four million dollars. Although 81.55% of the track miles were in Minnesota, only 60.4% of the total investment was in that State, and one mile of dock property in Wisconsin was worth forty-six times as much as an average single mile of track in Minnesota.

The above figures were for 1912. Similar investment figures as to each of the years 1908 to 1912, inclusive, are contained in the record and show similar relationships. Investment figures for years prior to 1908 were not given, but the judgment under attack includes every portion of the entire tax for every year, and clearly, if it was unconstitutional for any one year, the entire judgment must be reversed.

In addition to showing this inequality of investment, the record also shows an overwhelming preponderance of physical units and physical structures on the single mile of dock property in Wisconsin, as compared with an average mile of track in Minnesota. The dock yards alone which were nearly a mile long contain 53 parallel tracks, and, therefore, 53 times as many rails and ties as a mile of single track in Minnesota, in addition to switches and other yard facilities. The docks consisted of four separate structures, one of them all steel and concrete. They were a mile long and rose 75 feet above the water, and each one supported six parallel tracks or 24 in all. It is obvious from these facts, even if there were no investment figures in the record, that such a line cannot have anything like a uniform value per mile.

In addition to this excess value per mile of the physical property in Wisconsin, the record shows that the portion of the total charge fairly attributable to the single mile of dock prop-

erty in Wisconsin is much greater than that attributable to any single mile of track in Minnesota. This is so partly because the value of the plant which produces the earnings is so much greater per mile outside the State than inside, and partly because the amount of service furnished and the operating expenses incurred in producing it were much greater outside the State than inside. The record does not show the actual operating expense per mile in Minnesota, but it is common knowledge that a train and engine crew of five or six men could haul 100 cars of ore over a single mile of track in three or four minutes. Assuming a total wage cost of $50 a day or $6 an hour, the cost for this three or four minutes could not have been over thirty or forty cents for handling 100 cars one mile, and even if something were added for fuel, the actual out-of-pocket cost per car must have been only a fraction of a cent per mile in Minnesota. While there were no exact figures in the record on this, it is apparent from common knowledge that the cost per car per mile must be a very small amount.

On the other hand, when the ore reached the dock property, it still had to be transported one mile through the yards and along the dock, but in addition it received a large amount of other service. The record shows that cars had to be sorted in a classification yard in order to sort out, from the cars on hand, certain cars containing certain grades of ore. Taking a few cars from a long string of cars on a certain track one day, and a few other cars on other days, would mean moving the entire string each time so that the same car might be switched in and out of the track many times before being unloaded. Necessarily, a switch crew must handle fewer cars than a train crew and handle the same car more often. The switching required more than fifty tracks where the line haul transportation required only one. After the car was finally ordered to a

dock, a special gang of men was frequently required to prod the ore out of the car into the dock pockets, and out of the dock pockets into the steamer, with long poles, and when frozen, the ore had to be thawed out by steam. While there is no exact comparison in the record, the evidence makes it clear that the cost of switching and unloading a car by the Dock Company must have been many times that of transporting it over a mile of line haul in Minnesota.

A further reason why a larger portion of the charge is fairly attributable to the dock service than to a mile of line haul service, is that the dock service required the use of equipment and property for a very much longer space of time. The transportation of a carload of ore one mile in Minnesota required the use of a car for three or four minutes, and the use of an engine three or four minutes for a whole trainload of cars. For the dock service, the use of the car was required from several hours to several days. It required a correspondingly increased amount of engine service for switching, and the ore sometimes occupied a pocket in the dock for several days or weeks.

The total charge for the entire ore service from mine to steamer must be sufficient to pay all of the operating expenses of both the line haul and the dock service, and a return on the entire investment for the entire period of use. Included in the total charge, therefore, there must have been a comparatively small amount per mile for each of these factors in Minnesota, plus a comparatively large amount for each of these factors involved in the dock service in Wisconsin. The great value of the dock property, the comparatively long period of time during which both the dock property and the equipment were in use by each single ton or single carload of ore, and the comparatively large amount of labor involved in the dock service,

all compel the conclusion that out of the total charge collected, a much larger portion must have been fairly and properly attributable to the single mile of dock property in Wisconsin, than to any mile of the railway in Minnesota. This would necessarily have been true, even if the carrier had not made any actual division of the charge on its own books as between dock service and rail service.

In this case, however, the carrier had made such a division. Even if the separate identity of the Dock Company be ignored, and even if the contract between the Dock Company and the Railway Company for division of the charge be not regarded as a contract between separate entities, but regarded merely as a uni-lateral declaration by the Great Northern Railway Company, it is at least effective as a written record of the division of the charge made by the Great Northern Railway Company upon its own books. Under this contract, from one-fourth to one-third of the total through charge was set aside as compensation for dock service. During a part of the time the Dock Company was receiving 25¢ for its single mile of service, while the Railway Company retained 55¢ for 106 miles of service, or approximately ½¢ per mile for rail haul as compared with 25¢ for a single mile of dock service. The portion of the charge thus set aside for dock service was nearly fifty times as great per mile as the charge set aside for a single mile of rail haul.

The State did not offer any evidence whatever to show that this division of the entire charge was unfair or unreasonable. We believe that it is controlling until shown to be unreasonable. But assuming that it is not controlling, we are still confronted with the inescapable fact that in view of the amount of investment, duration of use of plant and amount of service involved, a very much larger portion of the total charge is fairly and properly attributable to the single mile of dock service, than to any mile of service in Minnesota.

Based on the foregoing facts, the decisions of this Court seem to make it very clear that the tax in question here cannot be sustained.

In the case of an ad valorem property tax, the State cannot appraise the entire value of an interstate line and tax a mileage prorate of such entire value, where it clearly appears from the evidence that the values per mile are not uniform but are substantially higher outside the State than inside. Such a tax is valid only to the extent that the system value can be shown to be fairly uniform throughout its length, so that a mileage apportionment fairly represents a value apportionment. *Pittsburgh, etc. Railway Company v. Backus,* 154 U. S. 421. At page 431 of the case last cited, the Court, while sustaining a mileage prorate, recognized that there would be an exception where valuable terminal property is shown to exist outside the State, so that a mileage prorate would not fairly reflect a value prorate. In such a case, some proper deduction must be made from the total value, in order to allow for such excess outside the State, before the mileage prorate is applied.

A mileage prorate of system value was held unconstitutional in *Fargo v. Hart,* 193 U. S. 490, where the system value which was prorated included securities held by a company outside the State, and where no deduction on this account was made before applying the mileage prorate. At page 500, the Court said:

> "But it is recognized in the cases that if, for instance, a railroad company had terminals in one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the state under a pretense."

In *Wallace v. Hines,* 253 U. S. 66, a special excise tax of fifty cents per thousand dollars invested in the state was held

invalid where the statute provided for a mileage prorate of the entire system investment, and where the system investment included valuable terminals outside the State for which no deduction was made. It is clear from the foregoing decisions, especially Wallace v. Hines, that where physical values per mile are unequal, there cannot properly be an appraisal of the physical value of the entire line and a mileage prorate of such value to a single state, without first making some reasonable deduction for the excess values outside the state.

And where the entire value of an interstate line is determined, not by an appraisal of the physical property, but by capitalizing its entire earnings, a mileage prorate of such interstate value to a single state is improper, where the evidence shows that the earnings per mile outside the state are substantially higher than the earnings per mile inside the state. In *Southern Railway v. Kentucky*, 274 U. S. 76, the franchise or intangible value of the Southern Railway system was determined by capitalizing the earnings of the entire system, and was then prorated to Kentucky on a mileage basis, the value of the intangible property which was otherwise assessed being deducted. The Kentucky tax was condemned by this Court in the case cited, not because the physical value per mile was higher outside the State, but because the earnings of the system per mile were shown to be very much greater outside the State than inside. It thus appears that a mileage prorate of a physical value appraisal is bad where there is an excess physical value per mile outside the State, and likewise a mileage prorate of a capitalization value is bad where there is an excess of earnings per mile outside the State, and where no proper deduction has first been made.

It is clear from these decisions that earnings fairly computed are a proper measure of value for purposes of taxation.

Capitalizing the total interstate earnings of the ore line, including docks, would be a proper method of determining the total value of the interstate line. But no total value of the ore line thus determined could properly be prorated to Minnesota on a mileage basis, because of the excess physical value per mile in Wisconsin. And obviously it makes no difference whether we first capitalize the total earnings and then apply the mileage prorate to determine a property valuation for Minnesota or whether we reverse this order, first applying the mileage prorate to the total earnings and then capitalize Minnesota's proportion of the earnings. The result would be mathematically the same, whether the mileage prorate is applied first to the total earnings, or whether it is applied to the total value derived by first capitalizing total earnings.

It is true that under her statute, Minnesota does not levy a property tax, and, therefore, it is not necessary for her to capitalize either the total earnings, or her mileage prorate of them. Instead she lays a direct tax upon her share of the earnings, without any capitalization or other determination of value.

But earnings from interstate commerce are not taxable per se by a state. Such a tax is sustainable only insofar as it can be regarded as a tax on property. State statutes which purport to impose taxes upon gross earnings of corporations derived partly or wholly from interstate commerce, have repeatedly been held unconstitutional as a burden on interstate commerce. *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania,* 122 U. S. 326, overruling *State Freight Tax,* 15 Wall. 232, which had previously upheld a tax on gross earnings of a railway derived from interstate commerce. Affirmed as to railroad gross earnings tax in *Galveston, Harrisburg, etc. Ry. Co. v. Texas,* 210 U. S. 217 at 224.

The Minnesota gross earnings tax statute and other similar statutes have been sustained only because they purported to be and were treated, not as gross earnings taxes, but as property taxes. The language of these cases makes it clear that the Courts always look askance at these and other statutes imposing taxes upon earnings of interstate carriers, and have sustained them only upon the theory and only to the extent that the earnings could fairly be regarded as an indication of the value of the property, and the tax as a tax upon the property and not upon the earnings. *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217; *United States Express Co. v. Minnesota*, 223 U. S. 335; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450; *Pullman Co. v. Richardson*, 261 U. S. 330.

It follows from these decisions that, in taxing directly her share of the earnings, Minnesota is using the earnings as a measure of the property value, just as truly as though she were capitalizing them and levying a property tax. It is only because this is so that the tax can be defended at all, since a tax upon interstate earnings per se is invalid. *Galveston, Harrisburg & San Antonio Railway Co. v. Texas*, 210 U. S. 217, is one of the cases in which this Court condemned a tax on railroad gross earnings. On page 226, the Court distinguished the case of *Maine v. Grand Trunk Railway*, 142 U. S. 217, in which a gross earnings tax had been sustained by saying that in the Maine case, "the estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile". There could hardly be a more apt statement of the point that we are making.

But, as we have seen above, Minnesta could not properly capitalize the entire ore earnings and prorate the total value thus obtained on a mileage basis, nor could she first prorate the total earnings on a mileage basis and then capitalize her pro-

portion, as the basis for a property tax. And since in this case she is using the earnings as a measure of property value, just as truly as though she were capitalizing them, it follows that she cannot properly determine her fair share of the earnings to be taxed by prorating the entire earnings upon a mileage basis. By so doing, she is taxing property in Wisconsin just as effectively as though she were prorating a system physical value.

That the constitutional difficulty is not avoided by avoiding a determination of property value and levying a tax directly upon a mileage prorate of the earnings, is established by the decision in *Oklahoma v. Wells Fargo*, 223 U. S. 298. In that case, the prorate was made in proportion to business done within the State instead of in proportion to the mileage, but the principle is the same. The total gross revenue of an interstate express company was prorated in proportion to business done, and a tax was levied upon Oklahoma's proportion. The Court held, however, that this was improper where there was included in the total gross revenue, receipts from sources entirely outside the State. The Court held that such receipts from outside sources could not properly be prorated to the State upon any basis. In approving Fargo v. Hart, the Court said:

> "In that case the tax was proportioned to mileage, and it was held that it could not be sustained when, although purporting to be a tax on property, it took into account, in order to increase proportionately the value of the mileage within the State, valuable property outside of it. *The same principle would apply to a property tax measuring the total property by the total gross receipts* increased by the special outside sources of income and taxing a proportion of this total fixed by the ratio of business within the State to that outside." (Italics ours.)

This decision coupled with the decisions above cited make it clear that any prorate, whether of a system physical value, a system earnings value, or of system earnings themselves, is unconstitutional, whether the prorate is based upon mileage or upon the proportion of business done, when there is included in the system value or in the system earnings, excess property values outside the State or excess earnings fairly attributable to sources outside the State. Some reasonable deduction must be made from the total, before any prorate can be sustained in such a case. Under the statute in question, Minnesota is using earnings properly attributable to Wisconsin as a measure of property values in Minnesota. She is levying a tax upon Wisconsin property just as truly as if she were prorating the entire physical value of the line, including the docks, on a mileage basis.

We have been discussing the case so far as though the entire service in Wisconsin were a line haul transportation service, differing from that in Minnesota only in the greater value of the property used, in the greater effort expended, and in the greater charge collected for it. Much of the argument which we have been making would apply if the interstate haul included only a mile or two outside the state, and if that outside mile or two consisted of a five million dollar tunnel, or a five million dollar bridge for which a special toll was computed and included in the total charge. Under such facts, the entire service would be a line haul transportation service, but under the decisions above cited, the application of the mileage prorate would be unconstitutional because of the inequality of the value per mile and earnings per mile. In the present case, however, we have the additional facts that the service performed on the dock property in Wisconsin is terminal and not line haul; that in part at least it is not a transportation service at all, either

terminal or line haul, but a manufacturing or processing service having no relation to mileage; and that there is, therefore, no relationship between track mileage, and that portion of the charge attributable to this dock service.

If this particular ore had moved to Seattle, for export to Asia, instead of moving to Lake Superior, and if the same dock revenue had been collected at Seattle, Minnesota's mileage prorate would be much smaller and she would now be claiming only about ten or fifteen per cent of the revenue thus collected, instead of 81%. And yet, the value of the trackage in Minnesota, the amount of service performed in Minnesota, and the amount of revenue actually earned in that State might all be the same as in the present case. This shows that there is no logical relationship between charges for dock service, and track mileage.

If the Dock Company in this case had been an entirely independent company, receiving as its division of the entire charge, the same amount paid to our Dock Company, there would be no contention that the Great Northern Railway Company could be taxed for any portion of its earnings. And yet here again the value of the Great Northern trackage in Minnesota, the amount of service performed, and the amount of revenue actually earned in that State would all be the same. It seems obvious that the amount of tax which the Great Northern should pay in Minnesota cannot fairly be made to depend on whether a dock located in Wisconsin is owned by the Great Northern or by an independent company.

It might well be that of two competing railroads handling ore traffic and having similar mileage and similar volume of traffic in Minnesota, one might own its own dock in Wisconsin, while the other might have a working arrangement with an independent dock company for the handling of its ore traffic,

the total charge being the same in both cases. Under these circumstances, the State would assess a much heavier tax against the company owning its own dock in Wisconsin, which would be a palpable discrimination not justified by the facts. These are further illustrations of the fact that there is no relationship between track mileage and dock charges, and that any attempt to prorate dock charges outside the State on the basis of track mileage is arbitrary and unconstitutional.

The record shows that wherever special charges are assessed for terminal service on commercial freight, such as switching, demurrage or storage, it is customary for Minnesota to tax 100% of such earnings when accruing in Minnesota and nothing when they accrue outside the State. The same rule applies to charges for storage of baggage and some elevation charges, and wharfage (R. 57-58, 118). It seems clear that this is logical and proper, because charges of this character do not vary with line haul mileage. There is no relationship between them. If all transportation charges were divided into a line haul charge and a separate charge made at each end for switching and loading or unloading, these separate charges should be handled the same way and apportioned 100% to Minnesota if within the State and nothing if outside.

If the outside terminal service in question here were an ordinary switching and delivery service, which is actually a part of the transportation, it might be argued that there must be a similar terminal service in Minnesota, and that it would be improper for the railway to apply a part of the total single charge to the outside switching service, unless it also applied a similar portion to the switching service in Minnesota, which would then be taxable 100% in Minnesota. Granting that this argument might be sound in the case of an ordinary outside switching service, which is part of the transportation, and

which has some counterpart in Minnesota, it is not applicable in the case of such a unique service as this Wisconsin dock service, which is a treating rather than a transportation service, and which has no counterpart, either in Minnesota, nor as far as the record shows, at any other place in the world.

In order to illustrate the difficulty in the present case more clearly, let us suppose, that a railroad should establish a charge of $1.00 for transportation of wheat from Montana to St. Paul and another charge of $1.25 for the same transportation, but including the milling of the wheat into flour in transit at Fargo, N. D. Clearly, there would be no impropriety in its computing and in setting aside upon its books, the 25 cents out of the total charge of $1.25 in the latter case, as revenue from the milling operation in North Dakota. If it should do so, there would be no logical basis upon which Minnesota could insist that a mileage prorate of the flour milling revenue should be used when computing the amount of railroad earnings in Minnesota, or the value of the tracks in Minnesota. Minnesota's share of the $1.25 charge, which includes milling in transit outside the State, should be no greater, in cents, than her share of the $1.00 rate which does not include milling. She might criticize the segregation of the revenue allocated to the milling operations as being unreasonable or unduly large. She might insist that a part of it was really transportation revenue and not milling revenue. But she could not insist that all of it was transportation revenue and she could not insist that a mileage prorate of all of it should be allocated to Minnesota.

In the case of iron ore, there are several processes which the ore must undergo before the pig iron can be delivered to the steel mills. If the ore contains an unusually large percentage of earth, it may be and often is put through a washing plant in

order to remove a part of the useless earth and avoid transporting it. This is usually done close to the mine and by the mining company. Secondly, ores of different grades and with different percentages of iron, silicon, sulphur and other constituents must be mixed in order to produce a proper grade for the blast furnaces. In Colorado and Alabama, presumably this is done either at the mine or at the furnace. In Wisconsin, it happens that it is done by the railroad company in transit, but is no more a part of transportation than is the washing process.

It is not inconceivable that the steel mills who ultimately consume the iron might wish to reduce steamship transportation charges by removing all of the foreign matter from the ore at the Head of the Lakes and reducing it at that point to pig iron by a blast furnace process. It is not inconceivable, that it might be found convenient and economical for the railroad to perform this service at the Head of the Lakes, and to include the charge for it, together with the charge for transportation in one single total charge to the shipper. If this were done in Wisconsin, there is no logical reason why a computation of the amount earned in Minnesota should include a mileage prorate or any other prorate of the revenue derived from operating the blast furnace. Even if the railroad had made no segregation of the total charges upon its own books, it should be permitted to make one, and deduct a reasonable amount of the total charge to cover the blast furnace service, before reporting its transportation revenues to Minnesota.

Many more pockets and much larger docks are required for the mixing and grading of ore than for the mere unloading of cars and loading of steamers, because when grading is being done, the pockets cannot be filled to capacity as the cars come in. Only a small amount of ore of a given grade may be

dumped into one set of pockets, and the balance of the capacity of the pockets must be held empty until another consignment of ore of the proper grade for mixing is received. According to the evidence in this case, this may take several days or weeks, so that a large number of pockets must be kept only partly filled at all times. Besides additional plant and additional investment which are thus required, it is obvious that there must be considerable additional switching involved in selecting particular cars containing particular grades of ore from among those on hand in the classification yard, and in returning the unwanted cars to the yards, to be held there until required. In this process, the same car may have to be switched several days in succession.

It is clear that all this additional plant capacity and investment, and all this additional switching is not required for the transportation of ore. If it were not for the treating process which is required, solid train-loads of ore could be run from the mine directly on to the docks, dumped into the pockets, and the cars returned to the mine for immediate reloading. This would require much fewer pockets, much fewer cars and much less switching service. The reason why the railroad performs the mixing and grading service is not because it is necessary to or any part of transportation, but because it happens that the mixing and grading service can be more economically performed by the railroad during the process of transferring ore from cars to pockets, than it can be done either at the mine or the furnaces.

The fact clearly appears, therefore, that the dock service does include treating or manufacturing processes, as distinct from transportation as would be the milling of wheat into flour in transit. This service has no counterpart in Minnesota or elsewhere. It involves additional expense and additional investment, and warrants and receives additional revenue. There

must of necessity be added to what the line haul charge alone would otherwise be, some factor to cover this dock service. The Railroad Company and the Dock Company computed what this factor in the charge should be, and recorded the computation in a written contract, by which the amount was awarded to the Dock Company. The State does not attack the reasonableness of the amount. It points to no counterpart of this service in Minnesota. It would follow, therefore, that even if we were to disregard the decisions quoted in the first part of this argument on the question of mileage inequality of value and mileage inequality of earnings, the constitutional application of the Minnesota statute to these particular earnings must be made impossible by the mere fact that the services are no part of a line haul, that they have no relation to mileage, that they are in part at least not a part of transportation at all, either terminal or line haul, and that neither the amount of earnings in Minnesota or the value of property in Minnesota can be made to vary one iota according to whether these services in Wisconsin are performed or not, or according to how much is paid for them, or according to whether they are performed in Wisconsin or Seattle.

In our case, emphasis is given to this argument, by the fact that the manufacturing, treating and storage processes which were being carried on in Wisconsin, were being handled by a separately organized subsidiary corporation, under the terms of a written contract which specifically allocated a fixed portion of the total charge as compensation for the Dock Company's service. This suit is brought against the Great Northern Railway Company to recover a tax on 81% of the Dock Company's earnings. We may grant that the State might attack this contract as fraudulent, or as awarding to the Dock Company an unreasonably large proportion of the total charge.

Minnesota might properly make a claim that a part of the amount awarded to the Dock Company was really line haul revenue, and was being paid to the Dock Company in bad faith. But she makes no such claim in this case. She does not claim that the division of the total charge is unreasonable. She asserts the right to tax her mileage prorate of every cent of the total charge, including whatever the Dock Company was justly entitled to for providing the additional plant, additional investment and additional switching required for the mixing and grading processes. This clearly she cannot do without violating the Federal Constitution.

The Minnesota statute declares that the proportion of interstate revenue taxable in Minnesota shall be "based upon the proportion of the mileage within the State to the entire *mileage over which such business is done*", (italics ours) and apparently contemplates revenue from business that is done over mileage, i. e., line haul revenue. If it were construed as thus limited, there could be no objection to it, at least when applied to an interstate line of approximately uniform value and earnings. However, in this case, the Supreme Court of the State has given it a much wider construction than that. It has made the Statute declare in effect that the mileage prorate shall apply even though a single mile outside of the State is forty times as valuable as the average mile in the State; that it shall apply to separately computed revenue, specifically set aside for terminal service performed entirely without the State; that it shall apply to such charges even though they are fifty times as great per mile as the average charge per mile within the State; and that if an interstate railroad shall render, outside of the State, any manufacturing, treating, or storage service, which is performed in transit, although not a part of transportation, and although performed by a subsidiary corporation,

the mileage prorate shall be applied to the entire revenue, including such portion as is fairly attributable to that service. As thus construed, the Statute is made to provide in effect, that a railroad cannot compute or set aside a specific portion of its total charge, for terminal services or for non-transportation services which it may perform outside of the State; that it cannot organize a separate corporation to perform such service; and that if it attempts to do so, it must still allocate to Minnesota a track mileage prorate of such charges, and must itself pay the taxes thereon.

Whether the amounts actually set aside for dock service and paid to the Dock Company were proper amounts and constituted a reasonable division of the entire charge or not, it seems clear from the foregoing decisions that it is incumbent upon the State to make *some* deduction from the total charge before applying her mileage prorate. She has not done so in this case. She has depended entirely upon the presumption of uniformity and equality, while the undisputed facts show that such a presumption is inapplicable here, and she is insisting that any revenue attributable to the treating process must be lumped with the rest. She may consider our payment to the Dock Company excessive and unreasonable, but this does not excuse her from determining upon an amount which in the judgment of her taxing officials is proper, and deducting that before applying the mileage prorate. When inequality of value and earnings, and a non-transportation character of part of the service are shown, Minnesota cannot prorate the entire earnings, and to attempt to do so without any allowance whatever for the outside excess value or earnings, or for the earnings attributable to the treating process, is unconstitutional.

Nor is it necessary for us to offer evidence that the amount of the resulting tax is unjust or inequitable, in the sense that

it is in a greater amount than the State could lawfully assess by any proper method. In such cases as *Fargo v. Hart*, 193 U. S. 490, and *Wallace v. Hines*, 253 U. S. 66, the taxpayer was not required to allege or prove that the amount of the tax was inequitable, but only that the method was improper. It may be that if the State had confined its tax to Minnesota property and Minnesota earnings, it could have levied an equal or greater amount of tax by some lawful method. We are not required to negative this. It is enough that we have shown that the State has adopted a method which in fact taxes property and earnings in Wisconsin. In *Oklahoma v. Wells Fargo*, 223 U. S. 298, the Express Company did not attempt to show that the amount of the tax was greater than the State could lawfully levy by any proper method. In all of these cases, the mere fact that the State has used a system or method which tends to tax property actually outside the State, has been enough to condemn the tax, regardless of whether or not the same amount of tax might have been defensible if determined by some other method.

Position of the State Court.

The opinion of the State Court says that "the evidence as to the values of specific portions of the ore line is far from satisfactory". The Court questions whether the investment account is properly charged as regards capital or maintenance. This is surprising, because the only witness, Mr. G. R. Martin, explained very fully (R. 59, 62, 94) that the accounts had been carefully kept covering the money actually invested in construction work from the beginning, and that from the time the Interstate Commerce Commission promulgated its rules and regulations, the accounts had been kept strictly in accordance with these rules and regulations. The exact cost of each

separate dock and the date of its construction were stated in detail (R. 69-62, 97-98, 100). It is true that the total investment as of years prior to 1907 was not given, but the totals as of the later years make it very clear that the investment per mile in the dock property must have been very much higher than in the track, even in the earlier years, and a description of the physical structures and large number of yard tracks owned by the Dock Company makes it obvious that the value per mile of that property must always have been very much in excess of that of the property in Minnesota. Moreover, this judgment covers a tax assessed for each separate year, and if we can establish unconstitutionality for any one year or for any five years of the period involved, the judgment must be reversed. We certainly show that for each one of the years 1908 to 1912, the tax was unconstitutional.

The State Court also declares that this evidence was given "apparently" upon some other theory, and that "there was no claim of unconstitutionality" in the trial court. Paragraph seven of our affirmative defense was before the trial court, and it specifically stated the grounds of unconstitutionality asserted here, and the evidence offered before the trial court supported it. The Supreme Court did not reject the constitutional question upon this ground. On the contrary, it heard and considered the constitutional argument and upheld the validity of the statute. The last two sentences of the opinion (R. 231) read, "We cannot see that the statutory scheme of taxation is unconstitutional or that the tax which it imposes works a hardship upon the defendant through an excessive valuation. Such earnings give the defendant's property great value which reflects itself in taxes". Regardless of how effectively the constitutional question was raised in the trial court, it clearly appears that it was raised and considered in the Supreme Court

and decided adversely to our position. The validity of the statute was sustained, and the question is before this Court as effectively as though the full constitutional argument had been presented at every step in the proceedings.

The State Court indicates some uncertainty as to whether we expect to claim that the entire gross earnings tax statute is unconstitutional, even when applied to ordinary revenue. The Court intimates that if that is our intention, there should be a more definite inquiry into the values of our other lines. In reply to this we may simply state that we are not claiming that the Statute is wholly unconstitutional or that it is unconstitutional as applied to ordinary revenue. Our only claim is that the application of the Statute to this particular revenue derived from the operation of Wisconsin docks is unconstitutional. We believe that the evidence is ample to support this contention, standing as it does wholly uncontradicted and unquestioned.

The only other suggestion of the State Court, in answer to this portion of our argument, is contained in the last paragraph of the opinion, where the Court points out that the entire property devoted to the ore service must be considered as a unit, including tracks in Minnesota and the docks in Wisconsin. It seems to be suggested that the docks would have no use, and, therefore, no value if the tracks in Minnesota did not originate the ore. It is suggested that the railway should be valued as a going concern. While the Court does not expressly say so, we assume that its feeling was that Minnesota could tax a part of the value of the docks because she contributed to that value through furnishing the ore for transportation. If this is the argument which is intended, it can be readily answered. The entire plant devoted to ore service including tracks in Minnesota and docks in Wisconsin may have a large going concern

value, but the fact remains that only 60% of that value is in Minnesota and not 81%. The total going concern value, whether it be higher or lower, is reflected in and measured by the gross earnings. Minnesota is undoubtedly entitled to tax her fair share of these, but she cannot tax them all, because a part of them are earned in Wisconsin. Nor can she tax 81% of them, because much more than 19% of the plant is in Wisconsin, and more than 19% of the service is performed there. After granting all that the Court says, the fact still remains that in this particular instance, a mileage prorate is not a fair or proper method of dividing the total value and total earnings, whatever they may be.

Ore Line Properly Considered Separately.

In the foregoing argument, we have treated the case as though the ore line were our only line of railroad. If this were so, or if the ore line were owned by an entirely independent company, operating that line alone, we believe that the State would not attempt to sustain the tax in this case. Under the decisions of this Court above cited, it would be invalid without any possibility of doubt.

But our opposing counsel state that the Great Northern Railway Company owns several other lines of railroad crossing the Minnesota boundary at different points and that we have terminals in the Twin Cities which may be more valuable than our Wisconsin ore docks. They urge that on the lines radiating from the Twin Cities, because of the great value of these terminals, a mileage prorate probably allocates to Minnesota too small a proportion of the earnings, and that there is probably an under-assessment in Minnesota on these lines which would offset the over-assessment on the ore lines.

Counsel also point out that if an exact allocation of the revenue on every shipment of all commodities moving over the Great Northern Railway Company were to be made according to the value of the line, we should probably find many of them where the mileage allocation is unfavorable to Minnesota and many others where it is too favorable. They urge that we should not be permitted to select items of the latter sort and build up a case by showing that we are over-assessed on these items, while ignoring the other traffic on which we are favored by the mileage prorate, and which probably restores the balance.

It may well be doubted whether any under-assessment on other lines would serve to justify the over-assessment in this case, even if such offsetting under-assessment were proven. Ordinarily an under-assessment on one piece of land is no defense against an over-assessment on another piece owned by the same man. An under-assessment against the Great Northern Railway Company upon property in Minnesota will not justify a tax against the same company by Minnesota upon property located in Wisconsin. And similarly an under-assessment on one item of earnings should not justify an over-assessment on another item.

In reply to this, it is contended that this is not a separate tax upon separate items of earnings, but a lump sum tax upon total earnings attributable to the State. This same contention, however, has already been overruled by this Court. In *Philadelphia S. S. Co. v. Pennsylvania*, 122 U. S. 326, the State attempted to levy a tax on interstate earnings of a steamship company. The tax was collected semi-annually, and the State argued that it was, therefore, a lump sum tax on a fund in possession of the steamship company and not a tax upon specific earnings. But the Court pointed out on page 341 that the receipts from interstate commerce "are followed and caused to

be accounted for by the Company, dollar for dollar. It is those specific receipts, or the amount thereof (which is the same thing) for which the Company is called upon to pay for tax." If in our case the tax in question here must be regarded as a tax upon the "specific receipts" for Wisconsin dock service, then it is obvious that the State cannot justify a tax upon them by pleading an under-assessment upon some other property or upon some other earnings in Minnesota. Under this decision, even if the existence of valuable terminals in the Twin Cities or the fact that our proof is confined to only a portion of our traffic, were sufficient to raise an inference of some offsetting under-assessment elsewhere, this would not be a defense against the over-assessment on the ore earnings.

But even if an under-assessment elsewhere is to be held sufficient in law to justify this over-assessment, we must remember that there is no evidence in this record that the Great Northern Railway Company has any Twin Cities terminals, or that they are more valuable than the ore docks in Wisconsin or the terminals in Seattle, Portland, Tacoma, Spokane and many other cities along the line. Indeed there are only the vaguest hints in the record that we own any lines of railroad other than the ore line. Any argument based upon our ownership of valuable Twin Cities terminals must be based on common knowledge or judicial notice.

Moreover, the mere fact that a railroad company may own terminals located in Minnesota which are more valuable than any terminals in any other state along the line, does not in itself afford any indication whatever that a mileage prorate of interstate earnings results in an under-assessment in Minnesota or that the mileage prorate is unfavorable to Minnesota. The more valuable terminals in Minnesota may handle a correspondingly greater number of shipments. The total earnings

tax on the greater number of shipments may be more than enough to pay an adequate tax on the higher value of the terminals. We cannot ordinarily determine whether a mileage prorate of earnings is fair by merely comparing the total investment in two states, without considering relative traffic density.

What we must compare to get an accurate result is the total investment *per car handled.* To illustrate this, let us suppose that a hundred small country stations outside the state each originates one car per day which moves to the Twin Cities terminals. The Twin Cities would thus receive 100 cars per day and would require trackage facilities for 100 cars while each of the small country stations would require a track sufficient for only one car. Presumably the Twin City terminals would be approximately 100 times as valuable as those in any of the single country towns. However, if we were to compare the investment in each state in the plant used in handling any one of these cars or any group of them coming from a single station, it would not be fair to credit the Minnesota investment with the entire cost of the Twin City terminal. Only 1/100 of the Twin City terminal would be used in handling the cars from any one country station, and it would not be proper to charge the total investment over and over again, against every car. Only 1/100 of it should be compared with the total investment in the country station. This illustration makes it clear that it is the investment in plant *per car handled* in each state and not the total investment in each state that must be compared, if we should attempt to prorate the earnings on any single shipment in proportion to the value of the plant used in transporting it.

To give one more illustration, suppose that we have 365 small country stations, each shipping one car a year to the

Twin Cities on successive days. Each of the country stations would require track capacity for one car and the requirement in the Twin Cities would not be much greater since it would handle on the average only one car a day, for 365 days. If one car a year were handled from a given country station, 100% of the investment in the loading track at that station would have to be carried by that one car. But the investment in a similar track in the Twin Cities terminal would be divided between 365 cars. The rate charged for each car would have to include interest on 1/365 of the investment in the Twin Cities terminal, plus interest on 100% of the investment in the country loading track, plus all other overhead and operating expenses. Therefore, in prorating the earnings on such a car between the two states upon the basis of capital charges, the country terminal should be credited with a capital charge 365 times as great as the city terminal, which is only another way of saying that the comparison must be made, not between total investment, but between investments per car handled.

It is clear from these illustrations that the existence of a terminal in Minnesota more valuable than any terminal in any other state does not in itself indicate that a mileage prorate of earnings results in an under-assessment in Minnesota. The contrary may be true. If the number of cars coming into the Twin City terminals is sufficiently large, the investment *per car handled* may be smaller in Minnesota than in any other state, and in that event a mileage prorate would result, not in an under-assessment, but in an over-assessment for Minnesota. The greater number of cars would give Minnesota more taxes than she is entitled to. We give these illustrations simply to point out that even though it were established in the record here that there are terminals in Minnesota more valuable than the Wisconsin ore docks, that fact taken alone would not in-

dicate nor even tend to indicate that a mileage prorate of our interstate earnings on our general traffic other than ore is not sufficiently favorable to Minnesota, or that there is any under-assessment there, to offset the over-assessment on the ore lines.

It is true that in considering the ore line and the ore traffic, we have compared total investments in Wisconsin and Minnesota, instead of comparing investments per car handled. But the ore traffic is of such a unique character that the result is the same in this particular case, whether we compare total investment or investment per car handled. The earnings which are in question here include the earnings, not on any part of the traffic handled into or out of the ore docks, but on every car entering or leaving those docks over a period of 12 years. Those cars originated, not at a large number of different stations scattered throughout different states over the entire line, but at a small number of mine spurs, located within the restricted area of the Mesabi Range, and entirely within the State of Minnesota. The investment in ore line in the State of Minnesota, as stated in the record, includes the investment in every one of the mine loading spurs. Therefore, if we desired to compare the investment per car handled in each state, we would simply divide the total investment in Wisconsin and the total investment in Minnesota by the same number of cars. The resulting quotients would necessarily bear the same ratio to each other as the total investments. It is this unique character of the ore traffic that makes it possible for us to single it out, as we have done, for comparison upon the basis of total investment.

The opinion filed by the Supreme Court of Minnesota (R. 228-229) points out that while the tracks serving the Range mines in Minnesota are used exclusively for ore traffic, and while the docks and 7 miles of adjacent track in Wisconsin are

used exclusively for ore, the intermediate movement is over main line tracks which are also used for grain and other freight traffic and for passenger traffic. The Court points out that this joint use exists between Saunders, Wis., and Swan River and Hinckley, Minnesota, and objects that we do not take any account of the other freight and passenger traffic, and do not show how the use value of this jointly used track should be apportioned between ore and non-ore traffic. However, as the Court points out, the traffic other than ore which uses these tracks is the same traffic in Minnesota and Wisconsin, and necessarily has the same volume in each state. A glance at the map will indicate that the mileage used jointly by ore and non-ore traffic in Minnesota, is about five times that used jointly in Wisconsin. Therefore, any apportionment of a part of the investment value to traffic other than ore would necessarily give the non-ore traffic an apportionment about five times larger in Minnesota than in Wisconsin. This would leave a correspondingly smaller portion of the total investment chargeable to the ore traffic in Minnesota, and would throw a still larger percentage of the investment chargeable to ore in Wisconsin.

The investment figures in the record indicate that the twenty miles of track in Wisconsin cost approximately $81,000 per mile. If the cost of the thirteen miles used jointly by ore and other traffic were deducted entirely from the Wisconsin investment, and charged entirely to other traffic, and even if no deduction whatever were made from the investment in Minnesota, there would still remain in Wisconsin, chargeable to the ore traffic, about 34% of the entire investment in ore lines and docks, as compared with a mileage pro rate of only 18.45%. In other words, the tremendous dock investment is the controlling

factor in this case, and the use of tracks by other traffic is negligible. The investment per car handled for ore in Wisconsin would still be nearly double the mileage prorate, even if the Wisconsin investment in jointly used tracks were omitted entirely.

Except for the purpose of determining accurately the investment per car handled, we can think of no reason why a segregation between ore and other traffic using these tracks would be either necessary or desirable. Earnings from other traffic have already been segregated and reported to the State. The tax upon Minnesota's mileage prorate of these earnings has already been paid and the State has accepted it as satisfactory. There is no controversy as to that.

We repeat, therefore, that the ore traffic is of such a unique and segregated character, making exclusive use of such valuable facilities, that a comparison of total investment in ore facilities in the two states does conclusively establish an overtaxation of ore earnings in Minnesota; while the mere statement of a large total investment in Twin Cities terminals in Minnesota means nothing and does not indicate or tend to indicate that there was any offsetting under-taxation in Minnesota on other traffic. The value of the Twin Cities terminals is not shown in this record, but if it were, it would be a wholly immaterial fact, standing by itself, and without any figures as to traffic density, no matter how large such value might be.

We have seen that besides claiming that the value of the Twin Cities terminals would in itself offset the value of the Wisconsin ore docks, the State also points out that if the earnings on every shipment of all commodities were to be allocated between states, exactly in proportion to the investment in the plant in each state, such an allocation would probably vary in both directions from a mileage prorate, and we should find

cases where the mileage prorate is too favorable to Minnesota and others where it would be unfavorable. Therefore, they argue we should not be permitted to select only items where the mileage prorate is too favorable to Minnesota, and to build up a case of over-assessment on such items only, and ignore the others.

We agree that it would be improper to select certain shipments of grain moving between the Twin City terminals in Minnesota and country stations in North Dakota, and to argue that, because of the great value of the Minnesota terminals, the value per mile in Minnesota chargeable against this traffic is higher than the value per mile in North Dakota. This would be fallacious because we would be charging against this particular traffic, the entire value of the Twin City terminals, a large proportion of which is required by and used for traffic in other commodities, and to and from other states. Only a small proportion of the value of the Twin City terminals would be properly chargeable against grain traffic to and from North Dakota. The total value of the terminal cannot be charged against any selected portion of the traffic using it or against anything less than the entire traffic.

The same thing would be true of the Wisconsin ore docks, if they were used for general traffic as well as for ore traffic. We could not fairly charge the entire investment against the ore, and argue from that that the investment per mile in Wisconsin chargeable against ore was higher than that in Minnesota. But, as we have already pointed out, the ore traffic is unique, in that it constitutes the total traffic using the Wisconsin docks, and not only a selected portion, and in that it originates entirely at a restricted group of terminals in Minnesota, the entire value of which has been segregated and credited to Minnesota.

It may be possible, theoretically at least, to select individual shipments of grain or other general commodities, and to make a fair comparison of the value per mile in different states properly chargeable against each shipment. To do this on a fair basis, we would have to determine the proportion of the investment in each state fairly chargeable against each shipment, or in other words, the investment in each state per car handled. If the fallacy which we have been pointing out were to be avoided by this means, and a fair basis for comparing the values in different states were to be computed, we might find that, even on this fair basis of comparison, over-assessments in Minnesota would appear on some shipments and under-assessments on others. The State might still argue that we should not be permitted to select those items on which over-assessments appeared and to ignore the others. It may be argued that this is virtually what we have done in the case of the ore.

We think that there is merit in the State's contention that we should not ordinarily be permitted to select certain commodities such as grain, or to select traffic between certain handpicked stations in two states, and to show that as to this selected traffic, an over-assessment exists in Minnesota. In such a case, the fact that the commodities or the stations selected appeared to be handpicked, and to be selected from other traffic without any logical basis of distinction, except the one fact that the selected items disclosed a mileage inequality of value, would in itself condemn the selection.

But in this respect, the ore traffic differs fundamentally from traffic in any other single commodity, or between any other selected group of stations, because there is a logical reason for confining our showing in this case to the ore traffic, and omitting any showing as to other traffic. The ore traffic is unique. It moves 100% from a small group of loading spurs in a re-

stricted area in Minnesota, to a single group of docks in Wisconsin, and constitutes 100% of the traffic moving between these points. It is capable of segregation and analysis in a manner that is not possible in the case of any other traffic. The earnings from ore constitute about 25% of the entire interstate earnings of the Great Northern system which are taxable in any part in Minnesota. The ore traffic taken by itself produces an annual gross revenue larger than that of the average Class I railroad in the United States.

The earnings of this Dock Company had been omitted from our reports to the State of Minnesota for 12 years and the State had made no protest. After 12 years it made a specific assessment against these earnings and brought this action involving ore earnings only, which we were called upon to defend. There is, therefore, a perfectly satisfactory historical reason why the showing in this case should be confined to the ore earnings. Moreover, as we have just pointed out, the peculiar character of the ore traffic makes proof of over-assessment much easier than in the case of any other traffic, because it is a segregated traffic, moving in such tremendous volume. This in itself would be an adequate reason for confining our proof to the ore earnings. The fact that a mileage prorate on these ore earnings is unduly favorable to Minnesota does not tend to suggest in any way that a mileage prorate on grain, lumber or other traffic would be unfavorable to Minnesota. There is nothing whatever in this record nor in our conduct in this action to give rise to the slightest suggestions of that sort, or to create the slightest doubt or suspicion as to our other traffic. We conclude, therefore, that, having shown this over-assessment of our ore earnings, we are in the same position as we would be in if the ore line were our only property. The fact that we have valuable terminals in the Twin Cities and the fact that

we handle other general traffic on our other lines are both irrelevant. Neither of them tends to suggest or prove that there may be any offsetting under-assessments elsewhere.

The State has argued that the mileage prorate which is adopted in these gross earnings tax statutes is based upon a presumption that interstate railroad values and interstate railroad earnings are approximately uniform per mile and that this is a presumption which applies to the system value and the system earnings as a whole, and that, until this presumption is overcome by evidence of lack of uniformity for the system as a whole, it remains conclusive. Therefore, it is said, a proven inequality as to one item of traffic, or one part of the system, would in itself tend to prove the existence of an offsetting inequality somewhere else. If the mileage prorate of ore earnings is excessive, then mathematically the mileage prorate of other earnings must be deficient in order to produce the predetermined system uniformity established by the presumption.

One answer to this is that no presumption of mileage uniformity as to system value and system earnings can include values and earnings from a manufacturing or treating plant outside the state. Assuming that miles of property used for transportation are uniform and will offset each other, there can be no "presumption" that because the Great Northern has a unique ore treating plant in the State of Wisconsin, therefore, she must have something of the same character or of offsetting value in the State of Minnesota.

But the most effective answer to this argument, based on a presumption of system uniformity, will be apparent if we consider the character of the Great Northern system. The Great Northern Railway system consists of what are in effect two almost separate railroads. One of them handles general traffic

and is comparable in every way with the Northern Pacific, Milwaukee and other lines serving the Northwest. The other is the ore line which is comparable with the Duluth, Missabe and Northern Railway of the United States Steel Company, and which handles a unique traffic, the gross revenue from which is one-fourth of the total Great Northern interstate earnings taxed by Minnesota. A proven inequality exists as to this ore railroad, and the State is trying to show that an offsetting inequality in the opposite direction exists on the other. She deduces this from the presumption of system uniformity, and argues that if the mileage prorate of ore earnings is excessive, then mathematically the mileage prorate of other earnings must be deficient in order to produce the predetermined system uniformity established by the presumption. In this way the established inequality on one distinct part of our railroad, the ore line, is used as proof of an offsetting inequality in the other direction on our general system.

As a matter of fact the presumption of uniformity is quite as applicable to the general traffic lines alone, excluding the ore lines, as it would be to the entire property. The general traffic lines excluding the ore line, are quite comparable with the entire system of the neighboring roads, and the presumption of uniformity certainly applies as to these neighboring comparable systems. If we should sell the ore line to another company, the presumption of uniformity would admittedly apply to the remaining part of our system.

There is nothing in the character of our general traffic lines excluding the ore line, to indicate that there are excessive values per mile in Minnesota. It is common knowledge that the contrary is true. Our mountain construction, our tunnels, our long bridges, and our snow sheds are in Washington and Montana. Our thinnest traffic is at the west end, and so, based

upon matters of common knowledge, the probability is, not that the investment per car handled is higher in Minnesota, but that it is lower than the system average.

The State's argument mistakes the character of the presumption of uniformity. There is nothing in the character of that presumption to make it more strongly applicable to the entire system than to the general traffic lines alone. It is not an established general premise applicable to the system as a whole, from which a deduction can be made syllogistically, as the State is attempting to do here. It depends upon probability, and the Court's common knowledge, and not upon any decree of any statute or constitution. This probability of uniformity exists for the system as a whole, simply because it exists for individual lines, and the system is the sum of individual lines. To deny that it applies to individual lines or to the group of individual lines constituting our general traffic lines excluding the ore line, is to overthrow the entire basis of the presumption.

If it were necessary for us to prove that we are overtaxed for the system as a whole, we submit that we have done so. Our proof as to the ore line, coupled with the presumption that there is uniformity, neither excess nor deficiency, on our general traffic lines, establishes this. We have shown that as to one-fourth of our total earnings on traffic crossing the Minnesota border and amounting to over eight million dollars a year, or more than the entire revenue of an average Class I railroad, the mileage prorate allocates at least 20% too much to Minnesota. The mileage prorate allocates 81.55%, whereas the investment prorate is only a little over 60%. The over-allocation amounts to nearly two million dollars a year in earnings, and amounts to approximately $70,000 a year in excess taxes. The total excess tax involved in this action is over half

a million dollars. Surely a showing of such a tremendous over-assessment upon such a large volume of traffic, handled under such unique and separable conditions, coupled with the presumption that the tax on the general body of traffic is no more and no less than fair in our case, as in the case of our companion railroads handling general traffic, is sufficient to carry conviction to the mind of the Court that there must be a substantial over-assessment here, not only for the ore line alone, but for the system as a whole. And as we have pointed out above, this conclusion is greatly strengthened by the fact that the excess earnings in Wisconsin are derived largely from a treating process which has no direct relationship to transportation or mileage.

In considering whether the burden of proving a universal negative in this case, by negativing any under-assessment on other traffic, should be imposed upon us in this case, it seems relevant to give consideration to the fact that such a burden would be one impossible to meet. We have already seen that a comparison of total investments in two states tells us nothing. It is the investment per car handled which must be compared. And it would not do merely to lump the total investment for the State and divide this by the total number of cars handled in the State, because some cars move over only a short mileage to or from a small station and use only a small part of the total investment in the state, while others move a long distance and through expensive terminals and use a large part of the investment. An accurate survey would require a determination of the revenue earned on each item of traffic between each station taken separately in Minnesota, on the one hand, and each station separately outside of Minnesota on the other hand. We would then have to compare the mileage prorate of this revenue with a value prorate of the revenue, based on in-

vestment in and out of the state in that portion of the line between each pair of stations. This would necessitate a finding separately of the mileage, and of the value, from each station in Minnesota, to every point on the State border crossed by a Great Northern line, and from every such point on the State border to each station outside the State. It would mean thousands and thousands of valuations for different combinations of routes and stations, and in each case the computation would be complicated by the necessity of considering the investment per car handled rather than the total investment. Manifestly, it would be physically impossible to make such a computation as this, and yet only by this method could we demonstrate that there is no under-assessment under a mileage prorate of our general traffic sufficient to offset the over-assessment on the ore traffic. The burden of proving such a universal negative would be one impossible to sustain.

If an under-assessment on other traffic is to be regarded as a defense, it would be much simpler to require the State to prove it if any such exists. It is easier to prove a particular affirmative than a universal negative. They could confine their proof to the particular traffic as to which the under-assessments were alleged to exist, without having to offer proof as to every item of traffic on the line.

This system of taxation is of the State's choosing. She has undertaken to deal with interstate earnings, and she does so at her peril. She can tax interstate earnings only after she has effectively excluded the portions which do not belong to her. She is aided in this task by the presumption of mileage uniformity. But when that presumption has been overthrown as to an important line of railroad, and as to 25% of all our taxable interstate revenue, it would seem not unfair to insist that the State make a proper deduction for Wisconsin dock earnings

before applying her mileage prorate, or else assume the burden of proving that there has been an offsetting under-assessment upon some other traffic.

CONCLUSION.

If the Great Northern Railway Company were to form a subsidiary corporation engaged, outside the State of Minnesota, in operating a flour mill, an ore washing plant, or a storage, mixing and grading plant for ore, and if it were to handle whatever wheat or ore might be offered to it by the public, and to collect from its patrons an independent charge per ton for the service at the plant, Minnesota would never contend for an instant that she could tax any portion of the earnings. A statute purporting to do so would be clearly unconstitutional. But in this case the Supreme Court of Minnesota has said that the Minnesota Statute should be construed as attempting to do that very thing, and that it can properly and constitutionally do so, where the following conditions exist:

1. The commodity handled in the milling and treating plant must be a commodity that has been hauled or is to be hauled in part through the State of Minnesota, immediately before or immediately after being processed, and while still in the possession of the railway company.

2. There must be a single charge assessed against the owner which shall include both the line haul transportation service and the processing service.

The Minnesota Statute is made to declare that if these two conditions exist Minnesota can tax a proportion of the total charge including not only the transportation charge but also the revenue attributable to processing, and that the proportion of the *total* revenue so taxed shall be governed by the mileage

proportion of the *track haul*. The portion of the revenue attributable to the processing shall be taxed 10% in Minnesota if the plant is at Seattle and 80% in Minnesota if it is at Allouez, Wis. It is not incumbent upon the State to make any computation or deduction of the portion of the total revenue attributable to the processing service. Nor will the railway company be permitted to make such a computation or deduction of its own. If it attempts to do so, Minnesota can still tax the portion deducted, regardless of its fairness and reasonableness. The mileage prorate will still be proper, even though the plant outside the State is forty-six times as valuable per mile as any single mile in the State, and even though the portion of the charge allocated to the service outside the State is fifty times as great per mile as that for the service inside the State, and even though the service itself is vastly more valuable, elaborate and costly than any mile of service inside the State. How much further the State Supreme Court would go does not appear. If this principle is applied where the property is fifty times as valuable, presumably it would be applied where it is one-hundred times as valuable, or a thousand times as valuable. The only requisites for supporting a tax in Minnesota seem to be that there has been or is to be a consecutive transportation of the commodity partly in Minnesota, and that there must be only one total charge to the public. We submit that Minnesota has no such power over services performed outside of the State during a transit in interstate commerce. She has no such power over the total charge collected by a carrier for an interstate transportation plus a treating service performed outside the State in transit. The power ends when she has adopted a fair and reasonable method of computing what portion of the total revenues are earned within her own borders. That method must make some provision for excluding

revenue attributable to such a service as we have described here, and for excluding revenue derived from an investment as great as the one described here located outside the State. As she has not done this, we believe that the attempted tax must be condemned.

What seemed to be the only reply to this argument, seriously pressed by the State, is the suggestion that we might avoid this tax by bringing into Court a record of each one of the millions of interstate traffic movements handled on our entire system during the course of the year, and which move partly in Minnesota, and by submitting with each movement a separate valuation of the portion of our track used in Minnesota by such shipment, and of the portion of our track used outside of Minnesota, which would involve thousands of different valuations. The State defends this tax upon the general presumption of uniformity in value per mile and in earnings per mile, but she would deny to us the benefit of the same presumption as to our general traffic lines and our general traffic earnings. After we have proven an error amounting to several millions of dollars of earnings, as to one important line and as to one very important item of revenue, we must presume, not that the mileage prorate as to other lines is fair, but that it is equally wrong in the other direction, and we must proceed to establish a universal negative by disproving this as to all of our other items of revenue. We must do this even though the single mile of dock property outside the State is forty-six times as valuable as a single mile within the State; even though the traffic using the ore property is more than one-fourth of all our interstate traffic crossing any Minnesota boundary; and even though the revenue being taxed is derived from a treating process outside the State, having no relation to track mileage ,and not a part of the transportation. We believe that this is an accurate state-

ment of the State's position in this case, and we believe that to state it is to disprove it.

Respectfully submitted,

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